AVEL CONSULTANTS SDN. BHD. & ANOR.

v.

MOHD. ZAIN YUSOF & ORS.

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
WAN SULEIMAN SCJ
SYED AGIL BARAKBAH SCJ
[CIVIL APPEAL NO. 135 OF 1984]
1 APRIL 1985

COMPANY LAW: *Directors - Fiduciary relationship with the company - Conflict of interest - Breach of duties of directors.*

CIVIL PROCEDURE: *Order 14 application - For accounts and unliquidated damages - Whether judgment should be granted after finding of breach of directors' duties.*

Avel Consultants Sdn. Bhd. (Avel) is a subsidiary of Elmec Consultants Sdn. Bhd. (Elmec). The first and second respondents were directors of both Elmec and Avel whilst the third respondent was a director of Elmec only. Both Avel and Elmec were appointed as consultants of System Televisyen Malaysia Bhd. (STMB), a subsidiary of the Fleet Group, in respect of an engineering project known as Channel Three. A term of the said appointment was that in the event of the resignation of any key personnel involved in the Channel Three project, the appellants were required to inform the Fleet Group of such fact so that it could decide what to do next.

Subsequently the three respondents formed a firm called Perunding AJZ, with the object of carrying on business of consultant engineers. It began to canvass for work and even approached established clients of Avel and Elmec for the purpose of obtaining work. Even before Perunding AJZ was registered, the 1st respondent as managing director of Avel informed STMB that three of the key personnel of Avel on the Channel Three project were resigning. However, at that time, none of the said three personnel had given any resignation letter. Subsequently Avel's appointment as consultant engineers was terminated and Perunding AJZ was appointed instead to carry on with the Channel Three project.

Avel and Elmec then sued the respondents for breach of fiduciary duties and applied for judgment under O. 14. The learned Judge refused the application, hence this appeal.

Held:

[1] A director of a company is in a fiduciary relationship with his company and as such he is precluded from acting in a manner which will bring his personal interest into conflict with that of his company. The respondents had carefully planned the formation of Perunding AJZ which later on obtained the very job which was Avel's job. The firm had also canvassed for work from Avel's and Elmec's established clients and there was evidence that the respondents engineered the resignations of the key personnel on the Channel Three project. It is therefore clear that there can be no defence to the issue of breach of fiduciary duties.

[2] The submission of the Counsel for Avel and Elmec that once a breach of fiduciary duties is proved and there is no defence to this issue, the Court under an O. 14 application should give the declaratory judgment asked for and leave the question of assessment of damages and rendering of accounts to be dealt with by the Registrar, is well-founded. The cause of action is founded on the fact that the respondents as directors of the appellants have

committed breach of their fiduciary duties and this was so found by the learned Judge. Once he has so held, there can be no more defence to the appellants' suit and they should therefore be entitled to judgment and the rest of the case should only be a matter of the requisite relief to which the appellants would be entitled.

[Appeal allowed with costs.]

Cases referred to:
Lynds v. Waithman [1895] 2 QB 180
Central Discount Corporation v. Furlong & Ors. [1948] 1 All ER 174

For the appellants - Sri Ram (Liza Chen with him); M/s. Sri Ram Zulkifly & Kumar
For the respondents - C. Abraham (Dulip Singh with him); M/s. Dulip Singh & Co.

JUDGMENT

Salleh Abas LP:

Avel Consultants Sdn. Bhd. (Avel) is a subsidiary of another company called ELMEC Consultants Sdn Bhd. (Elmec). The first and second respondents were directors of both ELMEC and AVEL, whilst the third respondent is the director of ELMEC only, the parent company. They were appointed to the board of these two companies on 8 December 1981, 28 April 1983 and 7 May 1981 respectively. The managing director of Avel at the material time was the first respondent whilst that of Elmec was one Johari Jaalam. These two companies are carrying on business of consultants and advisers in all kinds of engineering works.

A company called Fleet Group Sdn. Bhd. on behalf of one of its subsidiaries called System Televisyen Malaysia Bhd. (STMB) by a letter dated 13 September 1983 appointed AVEL and ELMEC as consultants in respect of engineering project known as Channel Three. Para. 6 of the letter stipulated a term of the appointment to the effect that in the event of resignation of any key personnel involved in the Channel Three project and/or breakup in partnership in Avel Consultants Sdn. Bhd., AVEL and ELMEC were required to inform Fleet Group of such fact so that it could decide what to do next. For this project on 28 October 1983 AVEL received as first progress payment from STMB a sum of RM305,700.

On 30 November 1983 the three respondents formed a firm called Perunding AJZ with the object of carrying on business of consultant engineers, the same as that of Avel and Elmec. The firm commenced its business on 1 December 1983 and began to canvass for work. It even approached established clients of Avel and Elmec for the purpose of obtaining work.

However, even before Perunding AJZ was registered as early as 1 November 1983 the first respondent as Managing Director of Avel, acting in accordance with para. 6 of Fleet Group's letter of 13 April 1983 informed STMB that three key personnel of Avel, namely, Boon Kok Yong, Mark A Lian and Chee Yuen Foo would resign. It is observed that at that time none of these personnel had given any resignation letter. Chee Yuen Foo handed in his resignation letter at the end of January 1984, whilst Boon Kok Yong gave a similar letter on 6 February 1984. There is no evidence when Mark A Lian had given his resignation letter.

Pursuant to that notification on 18 November 1983 STMB terminated Avel's appointment as consultant engineers and subsequently appointed Perunding AJZ to carry on with the Channel Three project.

On 15 January 1984 Avel and Elmec sued the respondents for breach of fiduciary duties and after the defence was filed they took out summons to enter judgment in their favour praying *inter alia*, that:

(1) the respondents be declared that they were trustees for Avel and Elmec in respect of all professional charges received by them and/or their firm Perunding AJZ from 30 November 1983 up to 1 March 1984;

(2) the respondents be ordered to furnish an account of all sums so received during the aforesaid period; and

(3) for the said breach the respondents be ordered to pay damages which should be assessed by the Registrar.

George J who heard the summons refused the application and hence this appeal.

The law is clear that a director of a company is in fiduciary relationship with his company and as such he is precluded from acting in a manner which will bring his personal interest into conflict with that of his company. Clearly the formation of Perunding AJZ was carefully planned. The firm is not only a rival of AVEL and ELMEC of which at the material time the respondents were directors. It obtained the very job which was AVEL's job. Not only that, the firm canvassed for work from Avel's and Elmec's established clients, Kontena Nasional Sdn. Bhd. and there is even evidence to show that the Respondents engineered the resignations of the key personnel on Channel Three project. This is borne out by the evidence that the first respondent purporting to act as Avel's managing director informed STMB of the pending resignation of these personnel some three months before the personnel handed in their resignation letters. The result of this notification was at the expense of Avel which lost the job with the corresponding benefit to Perunding AJZ which gained it. It is, therefore, clear that there can be no defence to issue of breach of fiduciary duties. In fact, the learned Judge ruled that there was a clear breach but he was not prepared to give leave to Avel and Elmec to sign the judgment because in his view there were other reasons within the meaning of O. 14 r. (3) which entitled the respondents to defend the suit. These reasons are: First, because it was not clear to what extent and to which items of work of Perunding AJZ the breach occurred; and secondly, because the plea by the respondents justifying the breach is relevant to the question of damages. To support his decision the learned Judge relied upon two cases.

In our view these two cases do not go further than mere application of established principle when dealing with an O. 14 application in that the application cannot be granted where the defence raises a plausible dispute. In *Lynds v. Waithman* [1895] 2 QB 180, the writ was specially indorsed with a claim for liquidated sum, but the evidence went on to show that there was a plausible dispute as to the amount which was due to the plaintiff. Application for O. 14 was therefore refused. On the other hand in *Central Discount Corporation Ltd. v. Furlong & Ors.* [1948] 1 All ER 174 an O. 14 application was granted to the plaintiff but only for such amount as would reasonably represent the extent of the defendant's admission. The amount claimed was £19,811. The defendant admitted liability of £10,000 "or thereabouts". The Court of Appeal held that the admission did not mean exactly £10,000 because it was qualified by the expression "or thereabouts". It therefore granted leave to the plaintiff to sign final judgment to the extent of £8,000 only.

Encik Sri Ram, Counsel for Avel and Elmec, submitted that these two cases are not applicable in the context of the present appeal. Both the *Lynds v. Waithman* and *Central Discount Corporation* cases are cases involving claim for liquidated sums, whereas the case under appeal deals with a claim for account and unliquidated damages. It is his submission, therefore, that once a breach of fiduciary duties is proved and there is no defence to this issue, the Court under O. 14 application should give the declaratory judgment asked for and leave the question of assessment of damages and rendering of accounts to be dealt with by the Registrar.

We are of the opinion that this submission is well-founded. The cause of action is founded on the fact that the respondents as directors of the appellants have committed breach of their fiduciary duties and this was so found by the learned Judge. Once he has so held, there can be no more defence to the appellants' suit and they should therefore be entitled to judgment and the rest of the case should only be a matter of the requisite relied to which the appellants would be entitled consequential upon the finding. Thus, the reservations which the learned Judge alluded to, i.e. the identification of jobs which were subject to fiduciary duties and those which were not during the period within which the breach was committed and the reason for the respondents breaking away from the appellants - all these are relevant only for the determination of the extent of the remedies asked for. They are not relevant as a defence to the question of breach of fiduciary duties, which the learned Judge has already held to have been established.

That being the case, we allow this appeal with costs here and the Court below. The deposit is to be refunded to the appellants. The order which emanates from this judgment is that:

(a) judgment is entered in favour of the appellants on their claim that the respondents had acted in breach of their fiduciary duties;

(b) damages for such breach are to be assessed by the Registrar and the accounting by the respondents of all income in respect of all contracts for services secured by them or Perunding AJZ between 30 November 1983 and 1 March 1984 is to be dealt with by the same officer;

(c) there will be liberty to apply to the High Court generally if and when necessary.

Also found at [1985] 2 CLJ 11